

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

ELLIOT MCGUCKEN,

Plaintiff,

v.

NEWSWEEK, LLC,

Defendant.

Case No.: 1:19-cv-09617 (KPF)

DECLARATION OF SARA GATES

SARA GATES, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and an associate in the law firm of Cowan, DeBaets, Abrahams & Sheppard LLP, attorneys for defendant Newsweek Digital LLC (“Newsweek”).
2. I submit this declaration in support of Newsweek’s cross-motion for summary judgment against plaintiff Elliot McGucken (“Plaintiff”) and in opposition to Plaintiff’s motion for summary judgment.
3. A true and correct copy of the transcript from the deposition of Plaintiff, taken on March 15, 2021, is attached hereto as **Exhibit A**.
4. A true and correct copy of the transcript from the deposition of Newsweek’s first Fed. R. Civ. P. 30(b)(6) witness, Diane Rice, taken on March 10, 2021, is attached hereto as **Exhibit B**.
5. A true and correct copy of the transcript from the deposition of Newsweek’s second Fed. R. Civ. P. 30(b)(6) witness, James Etherington-Smith, taken on March 11, 2021, is attached hereto as **Exhibit C**.

6. A true and correct copy of Newsweek's rebuttal expert report of Lynn Oberlander, dated April 15, 2021, is attached hereto as **Exhibit D**.

7. A true and correct copy of screenshots of the album of Death Valley photographs that Plaintiff posted to his Facebook account, dated March 8, 2019, is attached hereto as **Exhibit E**.

8. A true and correct copy of screenshots of the album of Death Valley photographs that Plaintiff posted to one of his websites, www.mcgucken.com (the "Website"), dated March 7, 2019, is attached hereto as **Exhibit F**.

9. A true and correct copy of screenshots of the embed code offered by Plaintiff on his Website for the Death Valley photographs identified in Exhibit F and the process for embedding same, prepared by my office, is attached hereto as **Exhibit G**.

10. A true and correct copy of screenshots of two videos of Death Valley that Plaintiff created and posted to his YouTube account are attached hereto as **Exhibit H**.

11. A true and correct copy of screenshots of one of Plaintiff's Instagram accounts, [elliottmcgucken](https://www.instagram.com/elliottmcgucken/), is attached hereto as **Exhibit I**.

12. A true and correct copy of screenshots showing the steps to embed Plaintiff's Instagram post at issue, located at <https://www.instagram.com/p/Bu-VGhzlRSN/> (the "Instagram Post"), prepared by my office, is attached hereto as **Exhibit J**. The Instagram Post remains live as of this filing.

13. The embed code provided by Instagram for Plaintiff's Instagram Post is:

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<blockquote class="instagram-media" data-instgrm-captioned data-instgrm-permalink="https://www.instagram.com/p/Bu-VGhzlRSN/?utm_source=ig_embed&utm_campaign=loading" data-instgrm-version="13" style=" background:#FFF; border:0; border-radius:3px; box-shadow:0 0 1px 0 rgba(0,0,0,0.5),0 1px 10px 0 rgba(0,0,0,0.15); margin: 1px; max-width:540px; min-width:326px; padding:0; width:99.375%; width:-webkit-
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calc(100% - 2px); width:calc(100% - 2px);"><div style="padding:16px;"> <div style=" display: flex; flex-direction: row; align-items: center;"> <div style="background-color: #F4F4F4; border-radius: 50%; flex-grow: 0; height: 40px; margin-right: 14px; width: 40px;"></div> <div style="display: flex; flex-direction: column; flex-grow: 1; justify-content: center;"> <div style=" background-color: #F4F4F4; border-radius: 4px; flex-grow: 0; height: 14px; margin-bottom: 6px; width: 100px;"></div> <div style=" background-color: #F4F4F4; border-radius: 4px; flex-grow: 0; height: 14px; width: 60px;"></div></div></div><div style="padding: 19% 0;"></div> <div style="display:block; height:50px; margin:0 auto 12px; width:50px;"><svg width="50px" height="50px" viewBox="0 0 60 60" version="1.1" xmlns="https://www.w3.org/2000/svg" xmlns:xlink="https://www.w3.org/1999/xlink"><g stroke="none" stroke-width="1" fill="none" fill-rule="evenodd"><g transform="translate(-511.000000, -20.000000)" fill="#000000"><g><path d="M556.869,30.41 C554.814,30.41 553.148,32.076 553.148,34.131 C553.148,36.186 554.814,37.852 556.869,37.852 C558.924,37.852 560.59,36.186 560.59,34.131 C560.59,32.076 558.924,30.41 556.869,30.41 M541,60.657 C535.114,60.657 530.342,55.887 530.342,50 C530.342,44.114 535.114,39.342 541,39.342 C546.887,39.342 551.658,44.114 551.658,50 C551.658,55.887 546.887,60.657 541,60.657 M541,33.886 C532.1,33.886 524.886,41.1 524.886,50 C524.886,58.899 532.1,66.113 541,66.113 C549.9,66.113 557.115,58.899 557.115,50 C557.115,41.1 549.9,33.886 541,33.886 M565.378,62.101 C565.244,65.022 564.756,66.606 564.346,67.663 C563.803,69.06 563.154,70.057 562.106,71.106 C561.058,72.155 560.06,72.803 558.662,73.347 C557.607,73.757 556.021,74.244 553.102,74.378 C549.944,74.521 548.997,74.552 541,74.552 C533.003,74.552 532.056,74.521 528.898,74.378 C525.979,74.244 524.393,73.757 523.338,73.347 C521.94,72.803 520.942,72.155 519.894,71.106 C518.846,70.057 518.197,69.06 517.654,67.663 C517.244,66.606 516.755,65.022 516.623,62.101 C516.479,58.943 516.448,57.996 516.448,50 C516.448,42.003 516.479,41.056 516.623,37.899 C516.755,34.978 517.244,33.391 517.654,32.338 C518.197,30.938 518.846,29.942 519.894,28.894 C520.942,27.846 521.94,27.196 523.338,26.654 C524.393,26.244 525.979,25.756 528.898,25.623 C532.057,25.479 533.004,25.448 541,25.448 C548.997,25.448 549.943,25.479 553.102,25.623 C556.021,25.756 557.607,26.244 558.662,26.654 C560.06,27.196 561.058,27.846 562.106,28.894 C563.154,29.942 563.803,30.938 564.346,32.338 C564.756,33.391 565.244,34.978 565.378,37.899 C565.522,41.056

565.552,42.003 565.552,50 C565.552,57.996 565.522,58.943 565.378,62.101
 M570.82,37.631 C570.674,34.438 570.167,32.258 569.425,30.349
 C568.659,28.377 567.633,26.702 565.965,25.035 C564.297,23.368
 562.623,22.342 560.652,21.575 C558.743,20.834 556.562,20.326 553.369,20.18
 C550.169,20.033 549.148,20 541,20 C532.853,20 531.831,20.033 528.631,20.18
 C525.438,20.326 523.257,20.834 521.349,21.575 C519.376,22.342
 517.703,23.368 516.035,25.035 C514.368,26.702 513.342,28.377 512.574,30.349
 C511.834,32.258 511.326,34.438 511.181,37.631 C511.035,40.831 511,41.851
 511,50 C511,58.147 511.035,59.17 511.181,62.369 C511.326,65.562
 511.834,67.743 512.574,69.651 C513.342,71.625 514.368,73.296 516.035,74.965
 C517.703,76.634 519.376,77.658 521.349,78.425 C523.257,79.167
 525.438,79.673 528.631,79.82 C531.831,79.965 532.853,80.001 541,80.001
 C549.148,80.001 550.169,79.965 553.369,79.82 C556.562,79.673 558.743,79.167
 560.652,78.425 C562.623,77.658 564.297,76.634 565.965,74.965
 C567.633,73.296 568.659,71.625 569.425,69.651 C570.167,67.743
 570.674,65.562 570.82,62.369 C570.966,59.17 571,58.147 571,50 C571,41.851
 570.966,40.831 570.82,37.631"></path></g></g></g></svg></div><div style="padding-top: 8px;"> <div style=" color:#3897f0; font-family:Arial,sans-serif; font-size:14px; font-style:normal; font-weight:550; line-height:18px;"> View this post on Instagram</div></div><div style="padding: 12.5% 0;"></div> <div style="display: flex; flex-direction: row; margin-bottom: 14px; align-items: center;"><div> <div style="background-color: #F4F4F4; border-radius: 50%; height: 12.5px; width: 12.5px; transform: translateX(0px) translateY(7px);"></div> <div style="background-color: #F4F4F4; height: 12.5px; transform: rotate(-45deg) translateX(3px) translateY(1px); width: 12.5px; flex-grow: 0; margin-right: 14px; margin-left: 2px;"></div> <div style="background-color: #F4F4F4; border-radius: 50%; height: 12.5px; width: 12.5px; transform: translateX(9px) translateY(-18px);"></div></div><div style="margin-left: 8px;"> <div style=" background-color: #F4F4F4; border-radius: 50%; flex-grow: 0; height: 20px; width: 20px;"></div> <div style=" width: 0; height: 0; border-top: 2px solid transparent; border-left: 6px solid #f4f4f4; border-bottom: 2px solid transparent; transform: rotate(30deg); transform: translateX(16px) translateY(-4px) rotate(30deg);"></div></div><div style="margin-left: auto;"> <div style=" width: 0px; border-top: 8px solid #F4F4F4; border-right: 8px solid transparent; transform: translateY(16px);"></div> <div style=" background-color: #F4F4F4; flex-grow: 0; height: 12px; width: 16px; transform: translateY(-4px);"></div> <div style=" width: 0; height: 0; border-top: 8px solid #F4F4F4; border-left: 8px solid transparent; transform: translateY(-4px) translateX(8px);"></div></div></div> <div style="display: flex; flex-direction: column; flex-grow: 1; justify-content: center; margin-bottom: 24px;"> <div style=" background-color: #F4F4F4; border-

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radius: 4px; flex-grow: 0; height: 14px; margin-bottom: 6px; width: 224px;"></div> <div style=" background-color: #F4F4F4; border-radius: 4px; flex-grow: 0; height: 14px; width: 144px;"></div></div></a><p style=" color:#c9c8cd; font-family:Arial,sans-serif; font-size:14px; line-height:17px; margin-bottom:0; margin-top:8px; overflow:hidden; padding:8px 0 7px; text-align:center; text-overflow:ellipsis; white-space:nowrap;"><a href="https://www.instagram.com/p/Bu-VGhzlRSN/?utm_source=ig_embed&utm_campaign=loading" style=" color:#c9c8cd; font-family:Arial,sans-serif; font-size:14px; font-style: normal; font-weight: normal; line-height:17px; text-decoration: none;" target="_blank">A post shared by Elliot McGucken 45EPIC (@elliotmcgucken)</a></p></div></blockquote> <script src="//www.instagram.com/embed.js"></script>
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14. A true and correct copy of the article at issue, dated March 14, 2019 (the “Newsweek Article”), on Newsweek’s website, www.newsweek.com (“Newsweek’s Website”), is attached hereto as **Exhibit K**.

15. A true and correct copy of screenshots of the embedded Instagram Post on Newsweek’s Website and the embed and embed code in Newsweek’s content management system (*i.e.*, the back end of Newsweek’s Website) is attached hereto as **Exhibit L**.

16. A true and correct copy of emails exchanged between the writer of the Newsweek Article and expert sources is attached hereto as **Exhibit M**.

17. A true and correct copy of the Facebook post for the Newsweek Article is attached hereto as **Exhibit N**.

18. A true and correct copy of the metrics for the Newsweek Article is attached hereto as **Exhibit O**.

19. A true and correct copy of an email from Diane Rice, dated February 11, 2019, regarding editorial guidelines and the attachment is attached hereto as **Exhibit P**.

20. A true and correct copy of Instagram's Terms of Use, last revised April 19, 2018 and in effect in February 2019, which was captured by my office using a digital archive called Wayback Machine, is attached hereto as **Exhibit Q**.

21. A true and correct copy of Instagram's Data Policy, last revised April 19, 2018 and in effect in March 2019, which was captured by my office using a digital archive called Wayback Machine, is attached hereto as **Exhibit R**.

22. A true and correct copy of Instagram's Platform Policy, in effect in March 2019, which was captured by my office using a digital archive called Wayback Machine, is attached hereto as **Exhibit S**.

23. A true and correct copy of Instagram's Embedding page, in effect in March 2019, which was captured by my office using a digital archive called Wayback Machine, is attached hereto as **Exhibit T**.

24. A true and correct copy of Instagram's blog post, dated July 10, 2013, entitled "Introducing Web Embedding Instagram Content on Websites," is attached hereto as **Exhibit U**.

25. A true and correct copy of Instagram's Help Center page entitled "How can I remove my images from Google search?", in effect in December 2019, which was captured by my office using a digital archive called Wayback Machine, is attached hereto as **Exhibit V**.

26. A true and correct copy of screenshots of articles regarding the Death Valley lake and Plaintiff's photography of same by *SFGate*, *Smithsonian.com*, *Accuweather*, *Live Science*, *PetaPixel*, *Atlas Obscura*, the National Parks Conservation Association, *The Daily Mail*, *Express Digest*, *The Los Angeles Times*, *IFL Science*, *Hartford Courant*, *The Independent*, and *Science Alert* is attached hereto as **Exhibit W**.

27. A true and correct copy of Facebook's Platform Terms, updated on June 26, 2020, and a blog post describing changes to same is attached hereto as **Exhibit X**.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, belief, and recollection.

Dated: June 21, 2021
New York, New York



SARA GATES